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INJUNCTIONS TO RESTRAIN DIVORCE ACTIONS IN OTHER STATES.

The New Jersey courts in the recent case of *Von Bernuth v. Von Bernuth,* 73 Alt., 1049, has again held that an injunction will issue on motion of petitioner for divorce to restrain defendant from prosecuting an action for separation in New York.

The petitioner filed her petition for a divorce in the New Jersey court against the defendant. The defendant was then residing in New York, but by appearance through counsel, the court acquired jurisdiction over him. Finally he filed a cross petition for an absolute divorce against the petitioner. Prior to this last proceeding the defendant brought an action for separation in the New York courts against the petitioner on the same grounds. Petitioner applied to the New Jersey court for an injunction restraining the defendant from prosecuting the New York action because, (1) the New Jersey courts having first obtained jurisdiction of the parties were entitled to a determination of the issue, and (2) the New York action was vexatious to the petitioner.

Could the court of New Jersey enjoin the defendant from prosecuting the action in New York? The petitioner, if the in-

junction did not issue would have been compelled to defend two suits for substantially the same cause of action—desertion.

The doubt which early existed as to the power of English Chancery courts to grant injunctions restraining those over whom the courts had jurisdiction from *doing,* or compelling them by specific performance, *to do* certain acts in foreign jurisdictions has long since been removed. In *Penn v. Lord Baltimore,* 1 Ves. Sen., 444, specific performance of an agreement concerning the boundary of a North American province was decreed. The equitable maxim, *Aequitas agit in personam,* was the basis of the court's decision.

The case of *Lord Portarlington v. Soulby,* 3 M. & K., 104, decided in 1834, outlined the English rule so clearly that there is no doubt as to the power of those courts in proper cases to restrain an individual from prosecuting an action in a foreign court. This was a motion to restrain the defendant from suing in Ireland. It was contended that the English courts could not so interfere with the Irish courts. But the opinion of the court did not rest on such a ground. Courts had compelled parties within their jurisdiction to convey property situated abroad, to bring home goods from abroad. Why not forbid one from performing certain acts abroad?

Treatises on injunctions agree that courts may exercise this power. *Story's Equity Jurisprudence,* Sect. 899, says: "But although the courts of another, they have undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon these parties and direct them, by injunction, to proceed no further in such suits."

The *Amer. & Eng. Ency. of Law,* Vol. X, p. 908, states that by a clear weight of authority in England and America, equity, having jurisdiction of the parties, will enjoin them from instituting actions in other states and countries, where the facts justify it. 22 Cyc. 813, states the rule in substantially the same manner. See also *Pomeroy's Equity Jurisprudence,* Vol. III, p. 395, note 1.

Some English decisions hold contrary to the above doctrine. The court *In re Boyse,* 15 Ch. Div., 591, refused to restrain a

foreign creditor from proceeding in a foreign court against an administrator, holding that it had no authority to interfere with a foreign creditor, resident abroad, for suing in the courts of his own country.

In *Moor v. Anglo-Italian Bank,* 10 Ch. Div., 681, the court refused to grant an injunction against an encumbrancer on immovable property situated in a foreign country, who had instituted legal proceedings in that country for the purpose of enforcing his rights.

In *In re Chapman,* 15 Eq. 75, the court refused to restrain foreign creditors from continuing actions brought in New York courts, although a receiver to the debtor had been appointed.

There are some decisions in this country contrary to this policy. *Carroll v. Farmers & Mechanics Bk.,* Harring (Mich.) 197, refused to follow this rule on the ground that if one state granted such an injunction the other might retaliate in like manner. This position cannot be maintained. The injunction is not directed against the foreign court, but to the parties to the suit.

In *Williams v. Ayrault,* 31 Bar., 364, an injunction was refused because the action in the court of a sister state had been *commenced* and *was pending.*

The most frequently cited decision adverse to the majority doctrine is *Mead v. Merritt,* 2 Paige 402. The court would not restrain proceedings which *had been previously commenced in the courts of another state* because of the danger of retaliatory measures being resorted to by the other state.

As to whether our courts recognize this doctrine, perhaps it would suffice to refer to the leading case of *Cole v. Cunningham,* 133 U. S. 107, where Fuller, C. J., rendering the opinion conceded this power to courts of equity of the different states. It was contended that the doctrine contravened the "full faith and credit" clause of the United States Constitution, but the contention was overruled on the ground that if equity courts of one state, in accordance with the established rules of equity, could control persons within their jurisdiction from the prosecution of suits in another, the Constitution could not be said to prescribe any different rule.

In *Massie v. Watts,* 6 Ch., 148, Marshall, C. J., said: "The court is of the opinion that in a case of fraud or trust, or of con-

tract, the jurisdiction of a court of chancery is sustainable wherever the person can be found, although lands not within the jurisdiction of that court may be affected by the decree."

The rule as laid down in *Williams v. Ayrault, supra,* was later, in *Vail v. Knapp,* 49 Bar., 299, overruled, where it was held that although an action had been commenced in a foreign court, the courts in a proper case, to prevent oppression or fraud, should act. No rule of comity forbade it. This doctrine was followed in *Claflin & Co. v. Hamlin,* 62 How. Prac. (N. Y.), 284; in *Allegany & K. R. Co. v. Weidenfeld et al.,* 25 N. Y. Supp. 71; and in *Dehon v. Foster,* 4 Allen, 545.

Harris v. Pullman, 84 Ill. 20, held that it was inconsistent with interstate harmony to attempt to control by injunction suits *already commenced in another state,* but New York and Massachusetts courts say that "extreme delicacy" should not deter the court from acting in proper cases. In all such actions the complainant must show that the suit sought to be restrained is brought in bad faith, or for the purpose of vexing the party seeking the injunction.

Such an injunction has issued to restrain divorce proceedings in the following cases:

In *Forest v. Forest,* 2 Edm. Sel. Cas. (N. Y.), 180, where both parties resided in New York and one of them attempted to carry on divorce proceedings in another state. In *Kittle v. Kittle,* 8 Daly (N. Y.) 72, where defendant of an action pending in New York commenced an action in Connecticut, intending to bring it to trial there, before the wife could go to trial in New York—she being unable to defend in Connecticut because of her lack of funds. In *Kempson v. Kempson,* 58 N. J. E. 94, and in *Huettinger v. Huettinger,* (N. J. Ch.) 43 Alt. 574, both being cases where mere prentended domiciles were alleged for the purpose of supporting the suits.

In *Dehon v. Foster, supra,* the court in restraining a Massachusetts citizen from attaching property in Pennsylvania as against a Massachusetts debtor so as to prevent it from coming into the hands of the assignee appointed by the Massachusetts court, says, through Bigelow, C. J.: "An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done. It is none the less a violation of our

laws because it is effected through the instrumentality of a process which is lawful in a foreign tribunal. By interposing to prevent it, we do not interfere with the jurisdiction of courts in other states, or control the operation of foreign laws. We only assert and enforce our own authority over persons within our jurisdiction to prevent them from making use of means by which they seek to countervail and escape the operation of our own laws, in derogation of the rights and to the wrong and injury of our own citizens."

DILIGENCE AND PRUDENCE AS AN ELEMENT OF GOOD FAITH.

By its decision in the case of *First National Bank of Birmingham, Alabama v. Gilbert & Clay,* 49 So. Rep., 513, the Supreme Court of the State of Louisiana accepts and adopts a common law doctrine as laid down by an Illinois court which seems to be too broad and too general a statement to stand as the accepted rule of law.

The question involved the payment of money by an authorized agent and the measure of caution called for by the party to whom it was paid. As the transaction took place in one state, though one party lived in and the action arose in another state, the law of the former state was applicable.

One Chisholm, a teller in the plaintiff bank, entered into a series of speculations with the defendant partnership, holding himself out to be the agent of an undisclosed principal who desired to keep out of the transactions. In the course of the speculations, Chisholm paid over, in various sums, the amount of $100,000.00. These amounts he paid while on duty as teller and through checks of his supposed principal which he handled in the ordinary course of business. The defendants, after dealing with Chisholm for some time, demanded to know his principal and upon his refusal to disclose him, closed out his account. At no time during the transactions did they make any effort to find out his authority as agent, or to assure themselves of the relations between Chisholm and his reputed principal. The money paid out was that of the plaintiff bank which alleges that the defendants, from the facts and conditions of the case, should have known that the undisclosed principal was a fictitious party and that Chisholm had been speculating for himself with the